PENDAFTAR PERTUBUHAN MALAYSIA A

v.

ESTABLISHMEN TRIBUNAL TIMBANGTARA MALAYSIA & ORS B

HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[ORIGINATING SUMMONS NO: R1-24-92-2009]
14 APRIL 2010 C

ARBITRATION: *Award - Setting aside - Whether 3rd defendant was presiding arbitrator under Arbitration Act 2005 - Whether appointment of 3rd defendant made with plaintiff's agreement - Arbitration Act 2005, s. 13(5)b - Whether arbitration proceeding null and void to be set aside - Whether 3rd defendant had legal capacity to preside as arbitrator* D

CIVIL PROCEDURE: *Declaration - Application for - Declaration that plaintiff's jurisdiction not subject to arbitration - Declaration that referral to arbitration was illegal by law, null and void - Whether plaintiff was empowered to conduct inquiry - Whether Societies Act 1966 provides for reference to arbitration - Whether arbitration proceeding null and void to be set aside - Whether 3rd defendant had legal capacity to preside as arbitrator - Whether action should have been brought by way of judicial review - Rules of the High Court 1980, O. 53* E

PUBLIC AUTHORITIES: *Remedies - Declaration - Whether plaintiff as public authority subject to arbitration - Whether plaintiff was empowered to conduct inquiry - Whether Societies Act 1966 provides for reference to arbitration - Whether arbitration proceeding null and void to be set aside - Whether 3rd defendant had legal capacity to preside as arbitrator - Whether action should have been brought by way of judicial review - Rules of the High Court 1980, O. 53* F G

The plaintiff, the Registrar of Societies, conducted an inquiry at the request of the 4th defendant. The 4th defendant was a senator who claimed *inter alia* that his termination as member of Parti Progressif Penduduk Malaysia ('PPP') was against the party's constitution. The plaintiff, upon conducting an investigation, came to the conclusion that the termination of the 4th defendant was not contrary to the constitution of PPP. The 4th defendant being dissatisfied with the plaintiff's decision referred the matter for arbitration. The 3rd defendant was appointed as the arbitrator who made an award in favour of the 4th defendant. The plaintiff H I

in this application sought *inter alia* the following reliefs: (i) a declaration that the plaintiff's jurisdiction was not subject to any arbitration; (ii) a declaration that the 4th defendant's referral to arbitration was illegal by law and was null and void; and (iii) an order to set aside the award made by the 3rd defendant. The issues to be determined were: (i) whether the function, statutory duty and/or jurisdiction of the plaintiff under the Societies Act 1966 ('Societies Act') was subject to an arbitration proceeding and; (ii) whether the award made by the 3rd defendant was *ultra vires*, null and void to be set aside.

Held (allowing the plaintiff's application):

(1) The plaintiff as a public authority was conferred with functions, duties and powers conferred by the Societies Act, thus the plaintiff was empowered under s. 6A of the Societies Act to conduct an inquiry upon receipt of the request from the 4th defendant. (para 20)

(2) There was no express provision in the Societies Act that provides for reference to arbitration in relation to any act or decision by the plaintiff, in the exercise of its statutory power under the Societies Act. In the absence of such provision, the court was not entitled to supplement the legislation or add anything that was not clearly intended by the legislature. Thus, the duties or functions carried out by the plaintiff in the exercise of its statutory powers would not be subject to arbitration. (paras 22 & 23)

(3) The Arbitration Act 2005 ('Arbitration Act') stipulates that a 'presiding arbitrator' is one designated in an arbitration agreement. Since in this instance, there was no arbitration agreement between the parties involved, the 3rd defendant could not be the 'presiding arbitrator' within the Arbitration Act. The 3rd defendant therefore lacked the legal capacity to preside as arbitrator. (para 26)

(4) There was no evidence that the appointment of the 3rd defendant was made with the agreement of the plaintiff as envisaged by s. 13(5)b of the Arbitration Act. The appointment of the 3rd defendant was therefore contrary to the provision of the Societies Act and thus was invalid. Consequently, the arbitration proceeding presided by the 3rd defendant was null and void and had no effect on the plaintiff. (para 26)

(5) The plaintiff was merely exercising its function as a public authority. The 4th defendant being aggrieved with the plaintiff's decision should have made an application for judicial review pursuant to O. 53 Rules of the High Court 1980. (para 28)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC ***(refd)***

Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No 2) [1975] 1 LNS 97 HC ***(refd)***

Mohd Noor Othman & Ors v. Hj Mohd Ismail Hj. Ibrahim & Ors & Another Case [1988] 2 CLJ 597; [1988] 1 CLJ (Rep) 224 ***(refd)***

PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 2(1), 5, 13(3), (5)(b), 23
Public Authorities Protection Act 1948, s. 2(b)
Rules of the High Court 1980, O. 53
Societies Act 1966, ss. 3, 6A, 7, 11

For the plaintiff - Datin Azizah Nawawi (Nadia Tajuddin with her) SFC; AG's Chambers
For the 1st, 2nd & 3rd defendants - Mohan Krishnan; M/s Kumar Partnership
For the 4th defendant - Sreekant Pillai; M/s Lim Sreekant & Co

Reported by Melinda Robert

JUDGMENT

Aziah Ali J:

[1] The plaintiff is the Registrar of Societies ("ROS"). By virtue of s. 3 of the Societies Act 1966 (Act 335) a Registrar of Societies is appointed by the Yang di-Pertuan Agong.

[2] The 1st defendant is the Establishmen Tribunal Timbangtara Malaysia ("MATE") with its address at No. 23-2, Lorong 6A/91, Taman Shamelin Perkasa, Cheras, 56100 Kuala Lumpur. The 2nd defendant is the President of the 1st defendant. The 3rd defendant was appointed as arbitrator by the 2nd defendant to determine the dispute raised by the 4th defendant. The 4th defendant is a Senator appointed as a Deputy Minister in the Prime Minister's Department.

[3] By way of this application the plaintiff seeks the following reliefs:

1(i) a declaration that the function, statutory duty and/or jurisdiction of ROS under the Societies Act 1966 [Act 335] is not subjected to any arbitration;

1(ii) a declaration that the 1st, 2nd and 3rd defendants are not a body/person that has jurisdiction in an arbitration proceedings between the plaintiff and the 4th defendant;

1(iii) a declaration that the referral by the 4th defendant to the 1st, 2nd and 3rd defendants is illegal by law and is null and void;

1(iv) a declaration that the notice of arbitration by the 4th defendant dated 9 November 2009 served by the 2nd defendant on the plaintiff is null and void and is not binding upon the plaintiff;

1(v) an order to set aside the award made by the 3rd defendant on 11 December 2009; and

1(vi) an order for stay of proceedings against the 4th defendant from any further proceedings;

2. costs in accordance with s. 2(b) of the Public Authorities Protection Act 1948 [Act 198]; and

3. such further or other relief as this Honourable Court deems fit and appropriate.

[4] The grounds for the application are as follows:

(a) The function, statutory duty and/or jurisdiction of the ROS under Act 335 is not subject to any arbitration;

(b) The 1st, 2nd and 3rd defendants are not body/person having jurisdiction in an arbitration proceeding against the plaintiff and the 4th defendant;

(c) There is no dispute between ROS and the 4th defendant under Act 335 which can be referred to an arbitrator.

Background

[5] Briefly the factual matrix that gave rise to this application originates from a letter dated 14 August 2009 from the solicitors for the 4th defendant to the plaintiff (exh. MAK2) which reads *inter alia* as follows:

> Mesyuarat Agung Khas Parti Progresif Penduduk Malaysia (Baru)(Ppp) Dan Pemecatan Senator Dato T Murugiah
>
> Kami mewakili Dato T Murugiah.
>
> Kami telah diarahkan oleh anakguam kami bahawa pada 14.08.2009, laporan media cetak-media cetak tempatan mengumumkan Yang Berhormat Menteri Dalam Negeri, Datuk Seri Hishamuddin Hussein sebagai berkata seperti berikut:
>
> (a) Perlantikan anakguam kami sebagai Presiden PPP pada mesyuarat Agung Khas (EGM) pada 24.05.2009 tidak boleh diterima kerana tidak mematuhi perlembagaan parti;
>
> (b) EGM yang diadakan pada 24.05.2009 adalah tidak sah dan terbatal; dan
>
> (c) Pemecatan Senator Dato T Murugiah adalah sah mengikut perlembagaan parti.
>
> Memandangkan isu-isu serius tersebut hanya diketahui melalui laporan akhbar dan media lain dan atas alasan bahawa keputusan-keputusan tersebut member kesan kepada hak-hak anakguam kami sebagai individu, ahli parti serta Timbalan Menteri.
>
> Kami memohon kerjasama segera pihak tuan untuk memberikan satu keputusan bertulis berkenaan perkara-perkara yang diumumkan oleh Yang Berhormat menteri serta alasan-alasan bagi keputusan tersebut untuk tindakan kami selanjutnya.

[6] The plaintiff replied by letter dated 26 August 2009 (exh. MAK3) stating *inter alia* as follows:

> 2. Berhubung perkara yang dibangkitkan di dalam surat tuan itu, hasil siasatan Jabatan mendapati:
>
> a. Pemecatan keahlian YB Senator Dato' T Murugiah di dalam Parti PPP adalah berlandaskan Perlembagaan Parti; dan

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b. Perlantikan YB Senator Dato' T Murugiah sebagai Presiden PPP melalui Mesyuarat Agong Khas (EGM) yang diadakan pada 24 Mei 2009 tidak boleh diterima kerana EGM ini tidak berlandaskan Perlembagaan Parti.

B

[7] The 4th defendant being dissatisfied with the plaintiff's reply regarding the result of the plaintiff's investigations filed an application at the Kuala Lumpur High Court for judicial review *vide* case No: R4-25-360-2009 wherein the 4th defendant sought an order of *certiorari* to quash the decision of the plaintiff dated 26 August 2009 as notified to the 4th defendant on 13 October 2009 (exh. MAK4). Leave was granted on 4 December 2009. On 30 December 2009 the 4th defendant discontinued the suit (exh. MT4).

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[8] The plaintiff thereafter received a letter dated 9 November 2009 from the 1st defendant under the hand of the 2nd defendant notifying the plaintiff that the 4th defendant has referred a dispute between the 4th defendant and the plaintiff for arbitration (exh. MAK5). In the said letter the 2nd defendant requested an explanation from the plaintiff regarding the dispute within 14 days and to forward to the 2nd defendant and the 4th defendant any comment or objection. It is also stated in the letter that the 2nd defendant will apply the 2005 Act to the application made. Enclosed with the letter is a 'Notis Rujukan Pertikaian Kepada Establishmen Tribunal Timbangtara Malaysia Menurut Seksyen 23 Akta Timbangtara 2005 Dan Kaedah-kaedah Mate Edidi 2006, (Kaedah No. 18)' which shows that the 4th defendant as complainant has raised a dispute as follows:

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3. Pertikaian yang saya bangkitkan adalah mengenai perkara berikut:

G

(a) Mempertikaikan keputusan Pendaftar Pertubuhan Malaysia berkaitan keputusannya bertarikh 26-08-2009 yang dianggap terkhilaf disegi fakta dan berat sebelah bertentangan dengan Perlembagaan Parti Progresif Penduduk.

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Thereafter the plaintiff received a memo dated 18 November 2009 from the 2nd defendant together with an affidavit affirmed by the 4th defendant (MAK8) and giving notice to the plaintiff to reply to the 4th defendant's affidavit within 14 days.

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[9] The plaintiff responded by a letter dated 25 November 2009 which states *inter alia* as follows:

> 2. Untuk makluman Y. Bhg. Dato', Jabatan ini telah menerima aduan daripada Y.B Senator Dato' T. Murugiah a/l Thopasamy (Penuntut) melalui peguamnya pada 18 Mei 2009 mengenai pemecatan keahliannya yang didakwa telah melanggar Perlembagaan PPP. Beliau juga mendakwa Mesyuarat Agung Khas (EGM) yang dijalankan beliau sebagai boleh diterima dan sah.
>
> 3. Penyiasatan yang dijalankan oleh Pejabat ini mendapati pemecatan beliau oleh PPP adalah mengikut peruntukan di bawah Perlembagaan PPP dan EGM yang dibuat selepas pemecatannya adalah tidak teratur kerana tidak memenuhi keperluan Perlembagaan PPP. Hasil siasatan Jabatan ini telah dimaklumkan kepada beliau melalui peguamnya seperti salinan surat berkembar. Jabatan ini berpendapat tidak ujud pertikaian di antara pendaftar Pertubuhan dengan beliau berhubung perkara ini.
>
> 4. Kertas Laporan Jabatan ini untuk kegunaan pihak MATE adalah seperti di Lampiran.

[10] The plaintiff further received a memo dated 1 December 2009 from the 2nd defendant together with a 'notis perbicaraan' dated 30 November 2009 notifying the plaintiff that arbitration proceeding would be conducted on 10 December 2009. In the notice dated 30 November 2009 it is stated that 'Sila Ambil Notis jika salah satu pihak tidak hadir tanpa memberikan sebab yang wajar, maka saya akan mengarahkan prosiding ini diteruskan secara sebelah pihak (*ex parte*).' (MAK11).

[11] On 10 December 2009 the 3rd defendant who was appointed arbitrator conducted the proceedings and the next day ie, on 11 December 2009 the 3rd defendant handed down the arbitration award (MT2) which reads *inter alia* as follows:

> Kesimpulannya, saya dengan ini mengeluarkan Award Muktamad yang berpihak kepada Penuntut iaitu:
>
> (i) Pemecatan beliau sebagai ahli PPP adalah tidak berpelembagaan dan berlawanan dengan Artikel 19 (Disiplin);
>
> (ii) Persidangan Agung Luar Biasa / Extra-Ordinary General Assembly (EGA) pada 24 Mei 2009 telah dijalankan mengikut Perlembagaan parti PPP sepenuh nya tanpa boleh dipertikaikan

Issues

[12] The plaintiff raised the following issues:

(a) whether the function, statutory duty and/or jurisdiction of the ROS under the Societies Act 1966 (Act 335) is subject to any arbitration proceeding; and

(b) whether the award made by the 3rd defendant on 11 December 2009 is *ultra vires*, null and void and must be set aside.

[13] In the written submissions by the learned Senior Federal Counsel, it is submitted for the plaintiff that the plaintiff as a public officer is empowered by s. 6A of Act 335 to make such inquiries as he deems necessary and a finding on the issues raised by the 4th defendant pursuant to the request by the 4th defendant.

[14] It is submitted that the plaintiff's statutory duty, function and/or jurisdiction is not subject to any arbitration proceeding. There is no empowering provision in Act 335 which provides for the function of the plaintiff under s. 6A to be arbitrated. If Parliament had intended that such statutory function, duties and jurisdictions of the plaintiff is to be subject to arbitration, such intention would be specified in Act 335 itself.

[15] It is further submitted that the plaintiff was merely exercising its functions as a public authority and it derives its powers from Act 335. The mode of challenging the decision of or the exercise of power by a person or body entrusted with the enforcement of public duties is by way of judicial review under O. 53 of the Rules of the High Court 1980. Therefore if the 4th defendant if at all was affected by or is dissatisfied with the findings of the plaintiff, then the 4th defendant ought to have applied for judicial review, which he did but subsequently withdrew.

[16] For the 1st to 3rd defendants it is submitted that the plaintiff cannot rely on the assertion that it is not subject to arbitration or that the 1st to the 3rd defendants have no jurisdiction to arbitrate against the plaintiff on the ground of waiver. It is submitted that the plaintiff has not raised any objections on jurisdiction and hence having acquiesced to any

irregularity, the plaintiff cannot now raise any complaint. Further it is submitted that given the conduct of the plaintiff prior to and in the course of the arbitration, the plaintiff is stopped from challenging the arbitration award.

[17] For the 4th defendant it is submitted that the plaintiff had not objected nor raised the issue of jurisdiction and had attended the arbitration proceedings on 10 December 2009 and 11 December 2009. Therefore the plaintiff is stopped from raising the issue of jurisdiction now. As the plaintiff did nothing therefore it is submitted that the plaintiff has been indolent and the court should not aid an indolent litigant. The 4th defendant further raises the failure of the plaintiff to specify the particular provision under Act 335 and the Arbitration Act 2005 (the 2005 Act) that the plaintiff is relying on and therefore it is submitted that the plaintiff's action ought to be struck out.

[18] The defendants further submit that the plaintiff has waived its right to object to jurisdiction by virtue of s. 7 of Act 335. It is submitted that the plaintiff ought to have filed for an injunction under s. 11 of Act 335 if the plaintiff does not want to submit to arbitration.

[19] In reply learned Senior Federal Council raised the issue of 'agreement to submit to arbitration'. It is submitted that there is no evidence that the plaintiff has submitted to arbitration or has agreed to the appointment of the arbitrator. There is also no written agreement between the parties which contains an arbitration clause. The exchange of correspondences between the 2nd defendant and the 4th defendant with the plaintiff are irrelevant and do not evince any intention on the part of the plaintiff to submit to arbitration. Hence the plaintiff is not obliged to take any action in respect of the arbitration since there is no agreement between the parties. Further it is submitted that by 'agreement' it means voluntary consent and it is therefore against the basic principles of arbitration if an 'indolent' party can be dragged to arbitration. Failure to express objection is not 'voluntary consent'. Further it is submitted that there can be no estoppels or waiver where there is no jurisdiction.

Decision

[20] The plaintiff as a public authority is conferred with functions, duties and powers conferred by Act 335. Henceforth upon receipt of the request from the 4th defendant, the plaintiff conducted an inquiry into the issue raised as he was empowered to do under s. 6A of the Act 335 which provides as follows:

> 6A. Power of Registrar to make inquiries, etc. in relation to any application under this Act.
>
> (1) The Registrar may, in relation to any application under section 6, subsection (1) of section 11, subsection (1) of section 12, section 49, subsection (1) of section 50, or any other provision of this Act or regulations made thereunder, call for such further information, and make such inquiries, as he may consider necessary.

Having made the inquiry the plaintiff notified the 4th defendant of its findings. It is the findings of the plaintiff that the 4th defendant has referred to the 1st defendant for arbitration. The chairman of the 1st defendant Che Khalid bin Md Ali, in his affidavit encl. 13 avers in para. 8 that by virtue of s. 5 of the 2005 Act, the 1st defendant has jurisdiction to arbitrate disputes involving the federal or state governments. Section 5 of Act 2005 provides as follows:

> 5. Government to be bound.
>
> This Act shall apply to any arbitration to which the Federal Government or the Government of any component state of Malaysia is a party.

[21] The plaintiff raised the issue of absence of any express provision in Act 335 that permits the exercise of the statutory functions, duties or powers by the plaintiff under the said Act to be subject to arbitration proceedings. Therefore the Plaintiff submits that the 1st defendant has no jurisdiction to arbitrate the issue referred to it by the 4th defendant. In any event it is submitted that there is no dispute between the plaintiff and the 4th defendant. The defendants on the other hand contend that jurisdiction has been conferred by waiver or acquiescence through the conduct of the plaintiff and therefore the plaintiff is now stopped from raising the issue of absence of jurisdiction. The defendants relied on the lack of objection and the plaintiff's attendance at the arbitration proceedings as signifying consent.

[22] It is not disputed that Act 335 does not contain any express provision that provides for reference to arbitration of any act or decision of the plaintiff carried out in the exercise of the powers conferred by the said Act. In the case of *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 Steve Shim CJSS said *inter alia*:

> ... The court then cited with approval the observation by Lord Simonds in *Magor & St Mellons Rural Distric Council v. Newport Corporation* [1952] AC 189 HL wherein he said that the duty of the court was to interpret the words of a statue that the legislature had used. It is of course trite law that if the intention of the legislature is expressed in words which are clear and explicit, the court must give expression to that intention. As *Bindra's Interpretation of Statues*, 8th edn, has stated:
>
> If the intention of the Legislature can be ascertained all rules of construction must yield to the Legislative intention (*Board of Trustees v. Johan Steele* [1933] SCO (SC) 47). They cannot override the legislative intent specifically expressed in the enactment (*State of Up v. Jaipal Singh Narsh* [1978] All L1 936). If the intention of the Legislature is clear, that intention constitutes the law.
>
> The primary duty of the court is to give effect to the intention of the legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such case best declare the intent of the law giver, (see *Bindra's Interpretation of Statues* 8th edn) ...

[23] The court is bound by the words in Act 335 and the 2005 Act just as much as the plaintiff and the defendants are. Where the legislature has not provided a particular remedy, it is not for the court to supplement the legislation and to add anything that is clearly not intended. In *Mohd Noor Othman & Ors v. Hj Mohd Ismail Hj. Ibrahim & Ors & Another Case* [1988] 2 CLJ 597; [1988] 1 CLJ (Rep) 224 at p. 227 Hashim Yeop Sani SCJ said:

> It is trite law that where the words of a statute are clear, there is no room for the court to go beyond the expressed language of the statute.

I agree with learned Senior Federal Counsel that in the absence of any provision in Act 335 allowing referral to arbitration of any act, duties or function carried out by the plaintiff in the exercise of its statutory powers, such act, duties or function would not be subject to arbitration.

[24] On the issue of consent by waiver or acquiescence as submitted by the defendants, I refer to the case of *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 at p. 154, Abdoolcader J in delivering the judgment of the Federal Court has this to say on the issue of jurisdiction:

> ... jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence. *It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction* (*Essex County Council v. Essex Incorporated Congregational Church Union* (at pages 820-821 per Lord Reid)). This principle that jurisdiction cannot be conferred by agreement or estoppel was firmly reiterated recently by the English Court of Appeal in *Secretary of State for Employment v. Globe Elastic Thread Co. Ltd.* in a decision which was reversed by the House of Lords but affirmed on this point. (emphasis added)

Applying the abovementioned authority I am unable to agree with the defendants that jurisdiction is conferred on the 1st defendant and also the 3rd defendant by the plaintiff's conduct. I agree with the learned Senior Federal Counsel that there can be no estoppel or waiver where there is no jurisdiction. Further in my opinion for the purposes of the 2005 Act where consent is a pre-requisite, such consent must be unequivocal and expressed in clear terms. In the case of agreements it must be found within the terms and conditions of the agreement. In the present case since there is no agreement of any kind between the plaintiff and the 4th defendant, in my opinion the absence of an agreement thereby determines the issue of consent.

[25] Be that as it may for purposes of completeness, I will deal with the other issues raised. Even if I find that the 3rd defendant does have jurisdiction to arbitrate, the defendants must show that both the plaintiff and the 4th defendant mutually consent to submit to arbitration. The plaintiff contends that such consent

must be by way of an agreement containing a clause where parties agree to submit any dispute arising between them to be resolved by way of arbitration.

[26] A reference to s. 2(1) of the 2005 Act shows that 'presiding arbitrator' means 'the arbitrator designated in the arbitration agreement as the presiding arbitrator or chairman of the arbitral tribunal, a single arbitrator or the third arbitrator appointed under sub-s. 13(3).' . Hence it is clear that the arbitrator contemplated under the 2005 Act is an arbitrator designated in an arbitration agreement, which by necessary implication shows that arbitration as contemplated by the 2005 Act is arbitration conducted pursuant to an arbitration agreement. This is fortified by the meaning of 'party' which means 'a party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, means a party to the arbitration'. Since in the present case there is no written agreement between the plaintiff and the 4th defendant, the 3rd defendant cannot therefore be the 'presiding arbitrator' and both the plaintiff and the 4th defendant cannot be 'party' within the meaning of the 2005 Act. As the 3rd defendant is not the 'presiding arbitrator' within the meaning of the 2005 Act, therefore he lacked the legal capacity to preside as the arbitrator on 10 December 2009. Further insofar as the appointment of an arbitrator is concerned, such appointment must be with the agreement of parties and in the event the parties fail to agree, then an application must be made to the Director of the Kuala Lumpur Regional Centre for Arbitration for the appointment of an arbitrator. Section 13(5) of the 2005 Act provides as follows:

> 13. Appointment of arbitrators.
>
> (5) Where in an arbitration with a single arbitrator:
>
> (a) the parties fail to agree on the procedure referred to in subsection (2); and
>
> (b) the parties fail to agree on the arbitrator, either party may apply to the Director of the Kuala Lumpur Regional Centre for Arbitration for the appointment of an arbitrator.

In the present case there is no evidence that the appointment of the 3rd defendant was made with the agreement of the plaintiff as envisaged by s. 13(5)(b). Therefore I find that the appointment of the 3rd defendant as arbitrator is invalid for being contrary to the provisions of Act 335. Consequently the arbitration proceeding

presided by the 3rd defendant is null and void and similarly the award made by the 3rd defendant is also null and void and of no effect whatsoever on the plaintiff. Hence the plaintiff's presence or purported participation in the arbitration proceedings conducted by the 3rd defendant is irrelevant.

[27] In the case of *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No 2)* [1975] 1 LNS 97 wherein Abdoolcader J (as the late judge then was) discussed the issue of excess of or want of jurisdiction as follows:

> There are two types of facts: facts which an authority (a term I use to include an inferior tribunal, administrative agency or other body exercising judicial or quasi-judicial functions) has undoubted power or jurisdiction to determine; and **facts which must exist before an authority can exercise jurisdiction**. The latter are **known as jurisdictional or collateral facts, the existence of which is a condition precedent for the application of a statutory standard or the assumption of jurisdiction by an authority to decide the case on its merits**. Thus, where an authority has power to requisition a vacant house, it is a condition precedent for requisitioning the house that it must be vacant which is a jurisdictional or collateral fact. (emphasis added)

In the context of the present case, upon consideration of the evidence I find that the 'jurisdictional or collateral facts' necessary before the 1st and 3rd defendants can assume jurisdiction are absent. Hence all the acts of the 1st, 2nd and 3rd defendants pertaining to the matter referred to them by the 4th defendant are invalid for lack of jurisdiction.

[28] The plaintiff has also raised the issue that the mode of challenging the decision of or the exercise of power by a person or body entrusted with the enforcement of public duties is by way of judicial review under O. 53 of the Rules of the High Court 1980. In the as yet unreported Federal Court case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 (Rayuan Sivil No: 01(f)-14 Tahun 2008), two questions of law were posed for determination:

> Question 1
>
> Whether pursuant to the amendment to Order 53 RHC 1980 *vide* gazette notification P.U.(A) 342/2000 with effect from 22.9.2000, any application to challenge the decision of a public authority, can only be commenced by way of a judicial review under Order 53 RHC 1980.

Question 2

Whether it is an abuse of the process of the court to commence the proceedings by way of a writ and a statement of claim to challenge the decision of a public authority instead of filing an application for judicial review under Order 53 RHC 1980 thereby evading the clear requirement of Order 53 RHC 1980.

James Foong FCJ said in his judgment *inter alia* as follows:

In brief, judicial review provides a means by which judicial control of administrative action is exercised - see *Council of Civil Service union v. Minister for the Civil Service* [1985] AC 374 @ 408.

In Malaysia, the exercise of the supervisory jurisdiction by the High Court over such bodies is found in Order 53 RHC

Order 53 RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in Order 53 RHC otherwise it would be liable to be struck of for abusing the process of the court. This general rule enunciated in *O'Reilly v. Mackman (supra)* has in fact been acknowledged by this Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors (supra)* and repeated in *YAB Dato' Dr Zambry (supra)*. However, like all general rule, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v. Mackman* where he referred to "particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons". Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. There may be others and these "are left to be decided on a case to case basis" as spoken of by Lord Diplock in *O'Reilly v. Mackman*.

When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

As the 4th defendant is aggrieved by the finding or decision of the plaintiff in the exercise of its statutory powers, thus applying the abovementioned authority I agree with the learned Senior Federal Counsel that the 4th defendant ought to have commenced action under O. 53.

[29] For the aforementioned reasons the plaintiff's application is allowed as prayed in terms of encl. 1.